No. 85-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., et al.,

Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Printed by Authority of the State of Illinois (P.O. 33020—75—11-6-85)

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Nos. 84-1689, 84-2045

RIVER ROAD ALLIANCE, INC., et al.,
Plaintiffs-Appellees,

v.

CORPS OF ENGINEERS OF
UNITED STATES ARMY, et al.,
Defendants-Appellants,

NATIONAL MARINE SERVICE INC.,
Defendant-Intervenor-Appellant.

Appeals from the United States District Court
for the Southern District of Illinois, Alton Division.
Nos. 82 C 5285, 83 C 5071—**William L. Beatty**, Judge.

ARGUED JANUARY 8, 1985—DECIDED MAY 17, 1985

Before WOOD, ESCHBACH, and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* We must decide whether, as the district court held, the Army Corps of Engineers violated section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, by granting a permit to National Marine Service Inc. for a temporary barge fleeting facility on the Mississippi River without having adequately considered the environmental consequences.

In 1980 National Marine Service (actually its predecessor, but we shall simplify the facts to shorten our opinion) applied to the Corps of Engineers for a permit under section 10 of the River and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, for a barge fleeting facility on

the Illinois bank of the Mississippi, just below the town of Grafton. A fleeting facility is a maritime parking lot—a place where barges are either anchored or moored to buoys while waiting to be towed. The facility was to have a capacity of 30 barges and to occupy 1,500 feet (and cover an area of five acres of water) of a seven-mile scenic stretch along what is called "Alton Lake" or "Alton Pool," but is actually a part of the Mississippi River. The State of Illinois, an appellee, acknowledges that Alton Lake "undergoes heavy barge traffic"; as many as 300 barges pass through it in a day. But the shores of the scenic portion are free from commercial development, except that National Marine Service has a shipyard, with until recently a fleeting facility attached, a half mile north of the proposed site. National Marine Service had leased that fleeting facility from the Illinois Department of Transportation, which cancelled the lease during this lawsuit.

The Illinois shore of Alton Lake is surmounted by dramatic bluffs; the Missouri shore is farm land. A scenic highway, the Great River Road, runs along the Illinois shore beneath the bluffs, and motorists have a view of Alton Lake and the Missouri shore beyond as well as of the bluffs to their east. (See Figure 1 at end of opinion.) National Marine Service's desire for the proposed fleeting facility was due in part to congestion at one of the locks of the Mississippi River. The lock is to be replaced (originally this was to be in 1987, but the current estimate is 1988), and the facility discontinued when that happens.

After holding a public hearing on the environmental impact of the proposed facility, the Corps of Engineers issued an "environmental assessment" which concluded that the facility would have no significant environmental impact. Concerning the facility's aesthetic impact, the Corps, while acknowledging that "bluff and river areas at and downstream of applicant's worksite clearly provide some of the most impressive and unique vistas of any area along the Mississippi River" and that "in the opinion of some individuals, the presence of [National Marine]'s proposed fleeting facility, or any similar intrusion into the

natural setting, would be aesthetically objectionable," noted that "other individuals welcome the opportunity afforded by the Great River Road for a closeup view of towboats and barges. In addition to the static visual effect of moored barge fleets, a fleeting operation also presents a view of normal activities on the waterway as small push boats work to move barges in and out of fleets during the disassembly and assembly of large tows. In any event, the aesthetic impairment, or enhancement, should be minimal since [National Marine]'s fleet will be limited to the length of six barges. If a motorist were proceeding along Great River road at a rate of 40 miles per hour, a fleet six barges long would obstruct his view of the river for less than 25 seconds."

Among other issues addressed in the environmental assessment was the possible impact of the proposed fleeting facility on a very large mussel bed downstream. There was concern that while the barges were being towed into and out of the facility, and assembled into tows or disassembled, the propellers of the tug boats would stir up silt on the river bottom, and this silt would drift down onto the mussels and smother them. The environmental assessment (as fleshed out by later documents prepared by the Corps) noted that none of the mussels were members of any endangered species, but it directed that the mussel beds be inspected again after the facility had been in operation for two years. Later in the administrative process, concern was expressed that the facility might hurt wintering catfish. There was also concern that no fishing of any kind would be possible along the stretch of shoreline that the facility would occupy, and that boating and other sports might also be harmed. The Corps did not think any of these consequences would be serious, nor that two historic towns, respectively 1.5 and 4.0 miles downstream from and out of sight of the facility, would be harmed.

The National Environmental Policy Act requires a federal agency to "include in every recommendation or report on proposals for legislation and other major Federal

actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C). Since the Corps found that the proposed barge fleeting facility would have no significant effect on the environment, it did not think it had to prepare the detailed environmental impact statement envisaged by section 4332(2)(C)(i); and if its premise was correct, so was its conclusion. See 40 C.F.R. §§ 1501.4(e), 1508.13 (regulations of Council on Environmental Quality). Since the proposed facility met the Corps' own cost-benefit criteria, see 33 C.F.R. § 320.4(a)(1), the Corps issued a permit for the facility, to expire however when the lock is replaced.

The facility went into operation in 1982. It operated at 30-40 percent capacity (9 to 12 barges) during the summer, the peak tourist season. A neighborhood group, and later the State of Illinois, brought this suit to enjoin it; the injunction was granted; and in 1984 the facility was shut down pending the outcome of this appeal. In granting the injunction the district judge issued an opinion that the plaintiffs had prepared for his signature. The main conclusion in the opinion is that the Corps of Engineers did not take a careful enough look at the environmental impact of the fleeting facility. The usual consequence of such a decision is an order to prepare an environmental impact statement. Although the district judge did not order the Corps to do so, and indeed expressly declined to decide whether the Corps had to do so, we find it hard to see how the Corps could have met his objections to the adequacy of its environmental assessment without doing so. The parties indicate implicit agreement with this point by relying for the most part on cases in which the question was whether an environmental impact statement had to be filed. We can therefore promote clarity by recasting the main issue on appeal as whether the Corps should have prepared an environmental impact statement. If we are right that the Corps did not violate section 102's requirement of such a statement for

all major federal actions having a significant environmental impact, or the section's separate requirement of consideration of alternatives to the proposed action, the plaintiffs' reservations about the adequacy of the environmental assessment and of related documents that the Corps did prepare would not warrant our upholding the district court's decision and returning the case to the Corps to prepare a somewhat more elaborate environmental assessment that would still fall short of being a full-fledged environmental impact statement.

Although the statute does not indicate how lengthy or detailed an environmental impact statement must be, and the required length and detail will of course vary with the nature of the proposed action whose impact is being studied, the implementing regulations require a formidable document. It will often be multi-volume and cost the government and the private applicant (if there is one, as there is here) hundreds of thousands of dollars to prepare; $250,000 is the estimate in this case. See 33 C.F.R. § 230.11; 33 C.F.R. Part 230, App. B, ¶¶ 3, 10-11. An environmental impact statement consisting of 858 pages plus two appendix volumes is mentioned in National Environmental Policy Act Oversight, Hearings Before Subcomm. on Fisheries, Etc., of H. Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess., ser. 94-14, at 172 (G.P.O. 1975). If such a statement were required for every proposed federal action that might affect the environment, federal governmental activity and the private activity dependent on it would pretty much grind to a halt. The Corps of Engineers alone receives more than 14,000 permit applications a year. Applying for a routine permit would often be economically infeasible if an environmental impact statement were always required. So it is no surprise that the statute does not require such a statement for every federal action having some environmental impact. The action must be "major," and the impact "significant." The Corps filed only 119 environmental impact statements in 1983. Council on Environmental Quality, Environmental Quality 1983, at 333 (1983) (tab. A-81).

The purpose of an environmental assessment is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement. See also 33 C.F.R. § 230.10. The environmental assessment is a brief document, see 40 C.F.R. § 1508.9, which under the Corps of Engineers' regulations is normally not to exceed 15 pages, see 33 C.F.R. § 230.9, and which here was only 4 pages long but was supplemented by 17 pages of additional findings. The statutory concept of "significant" impact has no determinate meaning, and to interpret it sensibly in particular cases requires a comparison that is also a prediction: whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides. The nature of the required judgment explains why we have held that an agency's decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion. E.g., *Wisconsin v. Weinberger*, 745 F.2d 412, 417 (7th Cir. 1984).

Although other courts have adopted what they conceive to be the higher standard of "reasonableness," *id.* at 417 n. 5; *Township of Lower Alloways Creek v. Public Service Elec. & Gas Co.*, 687 F.2d 732, 742 (3d Cir. 1982), we are not sure how much if any practical difference there is between "abuse of discretion" and "unreasonable." Courts dissatisfied with the "abuse of discretion" formulation are concerned that an agency whose primary mission is not the protection of the environment—an agency such as the Corps of Engineers—may tend to slight environmental concerns in deciding whether to encumber its decision-making process with an environmental impact statement. See the criticisms of the Corps in *Sierra Club v. Corps of Engineers*, 701 F.2d 1011, 1032-33 (2d Cir. 1983); *Sierra Club v. Sigler*, 695 F.2d 957, 962-63 n. 3 (5th Cir. 1983), and *Manatee County v. Gorsuch*, 554 F. Supp. 778, 783-96 (M.D. Fla. 1982)—but for a far more favorable view of the Corps see Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 Natural Resources J. 301, 318 (1976).

Such a tendency is bound to make the courts more alert for abuses of discretion than they might otherwise be. But realism about the danger of abuse does not require a change in the standard of judicial review. There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted, though there is no need to resolve our doubt here.

However the standard of review is worded, it is clear that the issue for us is not whether National Marine Service's barge fleeting facility was (and will again be, if we reverse) an unfortunate eyesore, marring one of the few remaining spots of essentially unspoiled natural beauty on the Mississippi River in the general vicinity of St. Louis; undoubtedly it is that (see Figure 2 at end of opinion). It is not whether we, if we were the Army Corps of Engineers, would have denied the permit. It is whether the Corps exceeded the bounds of its decision-making authority in concluding that the fleeting facility would not have so significant an impact on the environment as to require a more elaborate study of environmental consequences.

In so stating the issue, we assume either that the Corps' action in granting the permit was "major" or that "major" adds nothing to "significant." Although the criteria have been treated as distinct in this circuit, see, e.g., *Assure Competitive Transportation, Inc. v. United States*, 635 F.2d 1301, 1308-09 (7th Cir. 1980), no court has embraced the peculiar suggestion (rejected in *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1321-22 (8th Cir. 1974) (en banc)) that an action that might have a grievous impact on the environment would not require the preparation of an environmental impact statement if the action was in some sense minor. Indeed, the "minor" action (implying few benefits) that may cause major environmental harms is a prime candidate for requiring such a statement; if the cost of preparing such a statement deters the action, there is little lost, and much gained. It seems best not to speculate further on the

meaning of "major," but to assume that the Corps' action in authorizing the fleeting facility was major and to move directly to the issue of significant impact.

Here we can get little help either from administrative regulations (such as 40 C.F.R. § 1508.27, the ambiticus but nondirective effort of the Council on Environmental Quality to define "significant" impact) or from precedent. So varied are the federal actions that affect the environment—so varied are the environmental effects of those actions—that the decided cases compose a distinctly disordered array, as shown by Professor Rodgers' illuminating comparison of cases in which environmental impact statements were, and were not, held to be required. See Handbook on Environmental Law 756-61 (1977). There we read for example that an environmental impact statement is required for a government loan to build a golf course and park but not for a mock amphibious assault by a battalion of marines on a state park, or for a train shipment of nerve gas, or for certain exploratory mining operations. See *id.* at 758, 760-61.

Although the heterogeneity of the cases makes generalization difficult, we find some evidence in the recent cases of a loosening of the judicial reins on agency decisions not to require environmental impact statements. See, e.g., *City of Aurora v. Hunt*, 749 F.2d 1457 1468 (10th Cir. 1984) (new approach procedure for Denver airport); *City of New York v. Department of Transportation*, 715 F.2d 732, 741-52 (2d Cir. 1983) (regulations for transporting large quantities of radioactive materials by highway); *Township of Lower Alloways Creek v. Public Service Elec. & Gas Co.*, *supra*, 687 F.2d at 746-49 (expansion of a pool for storing spent fuel from nuclear reactor). Judge Friendly's interesting suggestion, made in dissent in 1972, that the meaning of "significant" be fixed at the lower end of the spectrum that runs from "not trivial" to "momentous," *Hanly v. Kleindienst*, 471 F.2d 823, 837, 839 (2d Cir. 1982) (dissenting opinion)—an approach never followed in this circuit, see, e.g., *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 231-32 (7th Cir. 1975);

First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973)—was the product of a time when environmental impact statements were less formidable than they have grown to be, when federal agencies were less sensitive than they mostly are today to environmental concerns, and, perhaps most important, when environmental assessments involved a less elaborate procedure for determining whether there was so significant an environmental impact as to warrant the preparation of an environmental impact statement. One of the things Judge Friendly was complaining about was his brethren's stepping up the requirements for such assessments, see 471 F.2d at 836; today, for good or ill, environmental assessments are thorough enough to permit a higher threshold for requiring environmental impact statements. We note in this connection that the number of environmental impact statements filed by all federal agencies fell by 50 percent between 1978 and 1983. See Council on Environmental Quality, *supra*, at 333 (tab. A-81). And finally there is growing awareness that routinely requiring such statements would use up resources better spent in careful study of actions likely to harm the environment substantially. See *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 858 (9th Cir. 1982).

Turning at last to the facts of this case, we note first that the Corps has the advantage over us of having heard live testimony from neighbors of the proposed facility and of being able to gauge the intensity as well as sincerity of the opinions expressed. An agency is not required to hold a public hearing before preparing an environmental assessment, see 40 C.F.R. § 1506.6(c), but if it does its decision is entitled to greater weight. The Corps also winnowed through hundreds of written submissions, which it could evaluate in light of the oral statements, as we cannot. The Corps also has a fund of knowledge and experience regarding the Mississippi River that judges of a federal court of appeals cannot match. Although the plaintiffs make fun of the Corps' remark that some people would enjoy a chance to see barges from close up, some

people did testify that they would enjoy this, and we cannot say that the Corps was unreasonable in believing them and in giving some weight to their tastes, however unrefined those tastes may seem to people who prefer natural to commercial vistas. And even if that testimony is wholly disregarded, it is still the case that whether a 1,500 foot line of barges, though undoubtedly an eyesore in a place of natural beauty, represents so significant a degradation of the environment as to require the Corps to prepare an environmental impact statement is a sufficiently close question to prevent us from substituting our judgment for the Corps'.

The Mississippi is not a wilderness area. There is heavy barge traffic, and National Marine's shipyard half a mile above the proposed facility. The facility will not be a shipyard, a dry dock, or a glue factory, but an aquatic parking lot—there will be little noise and little emission of fumes. It will be temporary, and will be removed without leaving any damage to the scenic properties of the area. Cf. *City & County of San Francisco v. United States*, 615 F.2d 498, 503 (9th Cir. 1980). The closest residence is three-fifths of a mile from the site. Considering all these facts we cannot say that the aesthetic impact of the facility alone was such that the Corps was unreasonable to regard the impact as insignificant. Aesthetic objections alone will rarely compel the preparation of an environmental impact statement. Aesthetic values do not lend themselves to measurement or elaborate analysis. See *Maryland-National Capital Park & Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1038-39 (D.C. Cir. 1973). The necessary judgments are inherently subjective and normally can be made as reliably on the basis of an environmental assessment as on the basis of a much lengthier and costlier environmental impact statement. The fact that there was public opposition to the fleeting facility cannot tip the balance. See, e.g., *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2d Cir. 1983). That would be the environmental counterpart to the "heckler's veto" of First Amendment law.

There is more to this case than aesthetics, but the other environmental effects are trivial indeed. There are no marinas or launch ramps for small boats in the vicinity of the proposed facility, and as the river is very wide at this point (almost a half mile) there is no danger of obstructing small (or for that matter large) boats. The loss of 1,500 feet of the shoreline to fishermen is unimportant since there is plenty of room elsewhere along the shoreline for fishing. There is no beach. The visual impact of the moored barges on joggers using a path along the Great River Road hardly deserves mention. Nor was the Corps required to give weight to the harm to the mussels—affecting as is the tale of how they will be smothered by the silt stirred up by the propellers. These mussels are not an endangered species, or even a sport fish. They live in beds owned by private persons who can do with the mussels what they want, including selling them for catfood or making buttons out of their shells or for that matter burying them in silt. Should it turn out that the barge fleeting facility kills any mussels—though there is no suggestion that this happened during the 18 months that the facility was in operation before the district court enjoined it—National Marine Service will be liable in damages in an action for nuisance brought by owners of the mussel bed.

The catfish provide a more difficult question because people fish for them; unlike the mussels in their beds, the catfish are not owned by anybody until they are caught. Although the fleeting facility will discourage catfish from scavenging beneath the barges, the fraction of Alton Lake occupied by the facility when it is full up with barges—five acres out of thousands—is minute; there is no reason to believe that catfish are significantly affected by so small a reduction in their stamping grounds. And catfish, of course, are not an endangered species—indeed, they are farmed extensively. Although the Fish and Wildlife Service opposed the fleeting facility, the Corps of Engineers was just required to hear the Service out, as it did—not to agree with it.

The plaintiffs also complain that the Corps failed to consider the cumulative effects of having many fleeting facilities in the general area of the one proposed by National Marine Service. Since any subsequent applicant for such a facility will have to get a Corps of Engineers permit too, the Corps will be able to prevent the problem from getting out of hand. The concern with cumulative effects seems anyway pretty academic since by the time any proposal for another fleeting facility in Alton Lake is processed, National Marine Service's temporary permit will have expired. In considering whether to renew it (should renewal be sought), the Corps will of course be required to consider any other proposal for a fleeting facility that is then pending before it. There were some other applications for permits for fleeting facilities pending at the time the Corps approved National Marine Service's, but they were either geographically remote from National Marine's site, or have been withdrawn, or both.

The plaintiffs' final complaint that we need consider (the others are insubstantial) is that the Corps of Engineers failed to explore alternative sites for the facility. Section 102(2)(E) of the National Environmental Protection Act requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 40 U.S.C. § 4332(2)(E). This requirement is independent of the question of environmental impact statements, and operative even if the agency finds no significant environmental impact. E.g., *Nucleus of Chicago Homeowners Ass'n v. Lynn*, *supra*, 524 F.2d at 232. For nonsignificant impact does not equal no impact; so if an even less harmful alternative is feasible, it ought to be considered. But the smaller the impact, the less extensive a search for alternatives can the agency reasonably be required to conduct. *City of New York v. Department of Transportation*, *supra*, 715 F.2d at 744. National Marine Service had made a study of alternative sites and found

none suitable. The Corps was entitled not to conduct a further study of alternatives unless the plaintiffs were prepared to shoulder the burden of showing that National Marine had overlooked some plausible alternative site—and they were not. The Corps is not a business consulting firm. It is in no position to conduct a feasibility study of alternative sites on the Mississippi for a barge fleeting facility, a study that would have to both evaluate National Marine Service's business needs and determine the availability of the necessary permissions from the owners of riparian land at the various sites. The Corps has to depend on the parties for such information, and National Marine Service's submission was unrebutted.

The judgment of the district court is reversed with directions to vacate its injunction and dismiss the suit.

Fig. 1

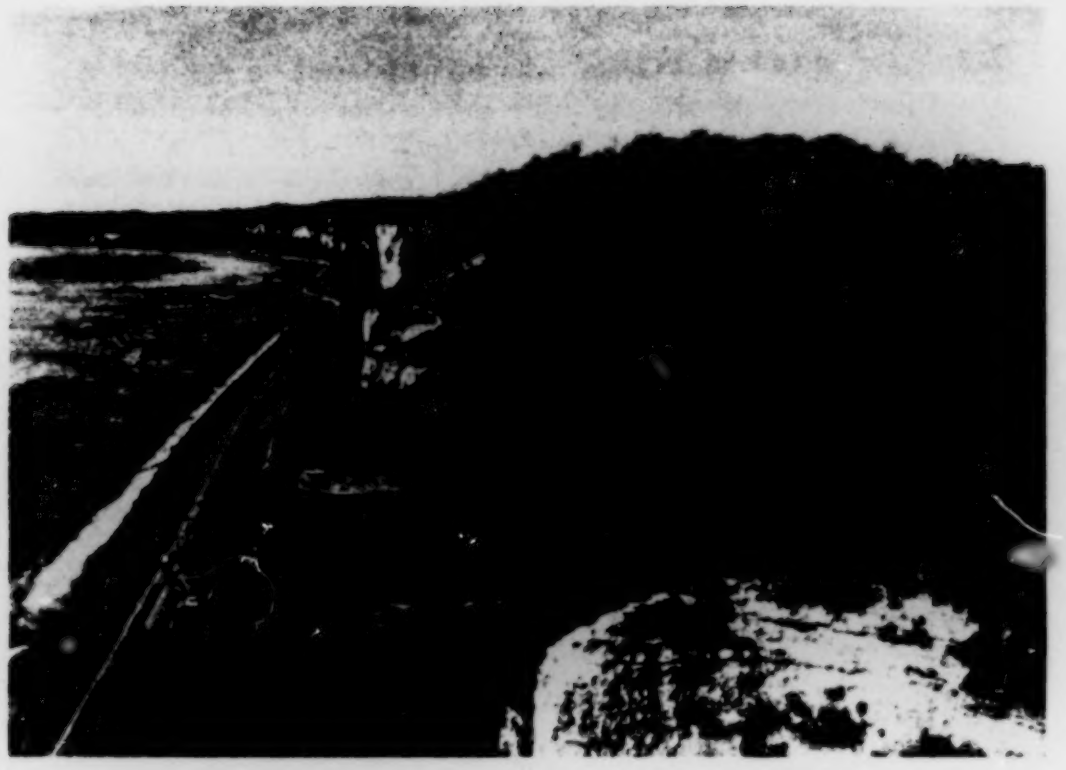

Fig. 2

WOOD, *Circuit Judge*, dissenting. Some of the enjoyment that thousands of people derive from this unique scenic area on a small bit of the Illinois shore of the Mississippi River is being sacrificed and the area damaged without sufficient justification for the financial benefit of a private commercial company.

Judge Beatty, the trial judge, knows this territory. He does not need to rely on a stagnant record and pictures to appreciate the diverse and adverse impact which will result from this commercial intrusion into this living park-like area. We should not therefore, in keeping with the spirit of *Anderson v. City of Bessmer, North Carolina*, 53 U.S.L.W. 4314 (March 19, 1985), so lightly toss his findings over the side. We should begin with them even if, as the majority says, they were prepared for him. Judge Beatty found that "the Corps has failed to take the 'hard look' required to support its conclusions, and has failed to document that 'hard look' in the Environmental Assessment, Findings of Fact and Finding of No Significant Impact, in violation of 42 U.S.C. Sec. 4332(2)(C) [NEPA] and the applicable regulations." Specifically, Judge Beatty held that the Corps' Finding of No Significant Impact was arbitrary and capricious because: the Corps inadequately considered the fleeting facility's impact on aesthetic values and recreational activities; the Corps excluded from consideration the cumulative impact of existing and foreseeable barge fleeting operations on Alton Lake; the Corps did not take a "hard look" at the facility's potential impact on the mussel bed and over-wintering catfish and did not give adequate weight to the views of the U.S. Fish and Wildlife Service and Illinois Department of Conservation; and the Corps inadequately evaluated the degree to which the fleeting operation's effects on the quality of the human environment are likely to be highly controversial, as required by 40 C.F.R. § 1508.27(b)(4). In addition, the court held that the Corps, and I believe this to be particularly significant in this case, violated section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), and implementing regulations by failing to "study, develop, and describe appropriate alternatives."

The majority opinion pays little heed to Judge Beatty's findings preferring to recast the issue and then to proceed with its own de novo consideration of the problems. The majority's newly framed issue is "whether the Corps should have prepared an environmental impact statement." Judge Beatty did not need to reach that question. He found only that the required initial step, the preparation of the Environmental Assessment, was inadequate to base the finding of No Significant Impact. The Corps, he found, did not take the "hard look" at the environmental consequences required by *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The majority, in response to its recast issue, raises the spectre of the Corps being required to produce, as in some other case, an environmental impact statement, possibly of 858 pages, and separate appendices requiring an expenditure of thousands of dollars. This, it says, would be economically unfeasible for a routine permit, 14,000 of which the Corps receives in a year. There is no need, however, for economic alarm as that is not this case.

The Corps produced an Environmental Assessment about the length of this opinion. Judge Beatty found, apart from the brevity of the Assessment, that the Corps only went through the motions. The Corps' soft, not hard, look may have been considered sufficient since the commercial intrusion was to be only temporary. Like many projects, however, it is less temporary now than it was originally. The latest forecast we have is that the time for completion of the new lock, to which this commercial intrusion is tied, has now been extended to 1988. This commercial permit supposedly would expire at that time.

I differ with the majority not only on what the issue on appeal is, but also with its view of the various environmental elements. I come to a conclusion generally supporting Judge Beatty's findings, a few of which will be commented on briefly.

A. Aesthetics.

To the Corps a thing of real beauty and professional enjoyment will be the new lock when it is completed, not the bluffs and river. That can be excused since the Corps, after all, is made up of professional and talented engineers, not artists, nature lovers, catfish fishermen, bikers, hikers, symphony directors, picnickers, joggers, local residents, students, or tourists driving peacefully along the Great River Road.

The Great River Road along the Mississippi River bank was created by Congress in 1973 to provide the public with access to the river's scenic views and recreational activities. The State of Illinois cooperated by acquiring scenic easements, including a scenic easement adjacent to this particular proposed commercial site.[1] That particular scenic easement and others nearby will now be good for an unobstructed view of barges, about the most uninteresting things afloat, not nearly as interesting to many as a piece of floating driftwood. For any barge enthusiasts there may be, as has been suggested, the heavy barge traffic and extensive commercial barge operations elsewhere along the river shore should provide more than ample barge-viewing opportunities. There is some concern that the Mighty Mississippi River will become in time the Mighty Mississippi Barge Canal. I doubt that the Museum of Science and Industry in Chicago would care to have one of the barges on display, even temporarily.

The majority measures the visual obstruction and impact of this commercial permit area only by the length of six barges in a row which a motorist going 40 mph would pass in 25 seconds. Some motorists, I think, would drive faster than that just to get past the barges. You can

[1] To appreciate the many activities this Great River Road Project offers, citizens may write to the Division of Tourism, Department of Commerce and Community Affairs, 227 South College, Springfield, Illinois 62706 for a copy of *Great River Road, Illinois*.

see the barges, tugboats, and related activity, however, on your approach long before you get there as you look up or down the river.

There is also an impact on the two little historical towns of Chautauqua and Elsah, but they are dismissed by the majority since they are between 1.5 and 4.0 miles downstream. Elsah is a charmer, a bit of the 1800's nestled in a little valley on the bank of the Mississippi River.[2] Since 1973 Elsah has been listed in the National Register of Historic Places. Principia College is within walking distance. Fortunately this commercial barge operation will not be at the foot of Elsah's main street, but nevertheless it is in Elsah's and Chautauqua's neighborhood. Neighborhoods have their own character and what harms part of a neighborhood harms it all. It is about the same as rezoning a residential area in order to permit some company to establish a gas station in the middle of it. The adverse impact on the whole neighborhood is greater than the mere width of the gas station lot.

B. Recreational Activities.

The area's recreational activities are deemed trivial by the majority, but that is not so for others, including that lonely jogger. The sport fisherman is said to be affected by this commercial barge facility for no more than the 1500 feet width of the site. Fishermen well recognize that finding to be at least a fishing error, if not a legal error. The boat and barge traffic coming and going to the facility from all angles stirring up the water and silt and the attendant noise and activity will extend well beyond the site's 1500 feet frontage. The fishermen, at least while they are fishing, are ordinarily a quiet lot for they know that you do not throw rocks in the water to attract fish.

The mooring area is not considered by the majority to be an obstruction to navigation, but the Corps conceded

[2] To understand and appreciate this rare little town, its people, and homes, see *Better Homes and Gardens, Country Homes*, September/October, 1984 which is devoted primarily to Elsah.

that it is. In any event the commercial barge traffic coming and going in all directions from the main river channel to this five acres of water will be a hazard for amateur boaters.

There are many ways that the enjoyment and use of this area will be affected, but we cannot pursue them all here.

C. Aquatic Life.

One of the largest mussel beds known to be in the upper Mississippi touches this commercial site. These mussels, according to the majority, at best are good for cat food and buttons. The Attorney General of Illinois, with help from the Illinois Department of Conservation, as can be seen from his brief, however, holds the lowly mussel in higher esteem.

> Mussels play several important roles in the riverine ecosystem including serving as a food source for certain birds and several species of fish. Mussels also provide a substrate for supporting numerous organisms such as algae, flatworm, leeches, and other mollusks which in turn serve as a food source. As filterfeeders, mussels reduce the amount of impurities in the water and serve as a valuable scientific tool providing important information regarding the presence of pesticides, heavy metals, and other pollutants in the river. It is uncontroverted that the mussel bed at this site has been productively harvested commercially for many years.

As for the bewhiskered catfish, the majority finds that he will only be minutely affected by being discouraged from scavenging beneath the barges. Not so. The actual concern is that the river bottom underlying and near this site where the tugboats will be approaching and maneuvering may provide potentially irreplaceable overwinter habitat for catfish which they need to survive. The majority apparently is not concerned since catfish, after

all, it notes, are also farmed.[3] True, but there is still a substantial catfish harvest in the river. In 1977, for instance, the harvest ranked first monetarily in the upper Mississippi. And, there are still a few people left who enjoy fishing along the bank with a cane pole, worm, and a red striped bobber.[4]

The barge operation is characterized by the majority as a static maritime parking lot with little activity, almost a pastoral scene. It is much more. It will be a mooring site, but there will be activity in assembling tows and their tugboats. Some of these tugboats develop 5,000 horsepower. It has been estimated that a single tow passage can move 2,700 pounds of sediment into nearby marshes and downriver creating turbidity that can last for several hours. Tugboats maneuvering at the site will have a scouring effect on the bottom causing injury to the mussels, fish, and plant life. With continuous turbidity

[3] The Illinois Department of Conservation, Division of Fisheries, Springfield, Illinois 62706, in a publication, *Potential of Catfish Farming in Illinois*, by Al Lopinot and Ray Fisher, begins with this background and words of caution:

> In recent years, successful catfish farming in Arkansas and Mississippi has aroused considerable interest. Both states are in the heart of the catfish farming belt as is Illinois in the corn belt. The potentials for catfish farming in Illinois are *very* limited because of the short growing season, lack of economical water supplies, and unexplored markets for the higher priced domestic product.
>
> To enter the catfish farming business requires suitable land for pond construction, an ample supply of water, a market for the fish, and technical know-how. Technical knowledge cannot be overemphasized—too many popular articles neglect this important issue, resulting in bankruptcy for many "rookie" catfish farmers. In addition, the potential farmer will need suitable financial backing and a license from the state in order to sell the fish.

[4] In the past year friends of mine fishing the tributaries have caught catfish weighing over 30 pounds, which even though it does little to help this case, at least has the makings of good fish stories.

fish and plant life and bottom fauna have little chance of surviving. This is one way things not now on the endangered list can get there.

The special conditions of the Corps' permit itself, intended to assuage environmental concerns, belies the majority's static view of this commercial site. Only "major repairs" are prohibited, so the site may be used for repairs considered less than major, whatever they may be. Work barges, anchor barges, fleet barges, derelicts and sunken vessels cannot be permanently moored at the site. They may be moored there temporarily, however long "temporarily" may be. Another interesting special Corps' condition requires minimization of the use of searchlights and noise from bullhorns and machines at the site, whatever that "minimization" may be. Residents along the river might adopt a little self-help by pulling down their window shades at night to obstruct the powerful searchlights. I have nothing to suggest, however, about how to minimize a bullhorn. That all tells us too that this new commercial area, even at night, will not be quiet and peaceful.

Conclusion.

I have expressed these different views of the environmental situation, not to substitute my judgment for the Corps, but to suggest that these considerations should have been enough to prompt the Corps, at least, to take a genuine "hard look" and to say to the company, "There are too many people and environmental problems in this special River Road area. Let's see if we can't locate a suitable alternative site. Other barge companies have found them so you probably can too somewhere up or down this big river where environmental harm can be minimized. It may be a little less economical or convenient for you, but after all, it is, as you say, only temporary."

Judge Beatty found the Corps did not comply with section 102(2)(E), 42 U.S.C. § 4332(2)(E) which requires the Corps to study, develop, and describe appropriate

alternatives.[5] The majority correctly states that this alternative requirement is independent of the question of an environmental impact statement which we have been considering, and is operative even if the agency finds no significant environmental impact. It is also stated by the majority that the company did make a study of alternate sites and found none to its liking. Permitting the company by itself and for itself to find and propose an alternate site less convenient for its pocketbook is a little like consulting the fox about the best location for the chicken house. The district engineer for the Corps, however, agrees that alternate sites could be found, but opted unfortunately to let this commercial enterprise into this "park" for the operational efficiency of the company and reduced fuel consumption.

The majority holds that the Corps, in spite of the statute and regulations, was entitled to accept the company's view of alternate sites. The alternative site burden is unloaded on those citizens or organizations who express environmental concerns. The Corps, the majority says, is not a business consulting firm, and the Corps would have to evaluate the company's business needs. Also the Corps would have to determine whether permission could be secured from owners at the alternate sites. That burden does not and should not lie with the concerned citizens who are now being held in default by the majority for not doing what the Corps and the company should have done. In any event section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), provides that the Corp "shall study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." That was not seriously done and it should have been.

In this case, I would, as Judge Beatty did, leave the question open for the Corps, if it desires, to take the

[5] 33 C.F.R. §§ 209.410(d)(1)(ii) & 230.5(e), 33 C.F.R. App. B, P.8(a), and 40 C.F.R. §§ 1500.2(e) & 1501.2(c) also require consideration of alternatives.

required "hard look." If a new look, but this time a "hard look" is to be taken, I would direct that special emphasis be given to alternative sites because of the unique circumstances of this special area. With a little encouragement from the Corps the company would soon find a suitable substitute area although it would be its second choice. It would, after all, be only temporary, and temporary works both ways, so the economic impact on the company of an extra mile or two should not be devastating. The impact on the company, in any event, would be a great deal less than even the temporary impact of its private commercial activities on the environment and the many citizens who could enjoy this area, a very rare area in this part of the world.

I must therefore respectfully dissent.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 17, 1985.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

Nos. 84-1689 and 84-2045

RIVER ROAD ALLIANCE, INC., et al.,
Plaintiffs-Appellees,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al.,
Defendants,

AND

NATIONAL MARINE SERVICE INCORPORATED,
Defendant-Intervenor-Appellant,

AND

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Defendants.

Appeals from the United States District Court for the Southern District of Illinois, Alton Division.

Nos. 82 C 5285 and 83 C 5071

Judge William L. Beatty.

This cause was heard on the record from the United States District Court for the Southern District of Illinois, Alton Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and with instructions, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 8, 1985.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

RIVER ROAD ALLIANCE, INC., et al.,
Plaintiffs-Appellees,

Nos. 84-1689, 84-2045 v.

CORPS OF ENGINEERS OF UNITED STATES ARMY, et al.,
Defendants-Appellants,

NATIONAL MARINE SERVICE, INC.,
Defendant-Intervenor-Appellant.

Appeals from the United States District Court for the Southern District of Illinois, Alton Division.
Nos. 82 C 5285, 83 C 5071
William L. Beatty, *Judge.*

ORDER

On May 31, 1985, plaintiff-appellee People of the State of Illinois filed a petition for rehearing with suggestion for rehearing *en banc*, and on June 17, 1985, plaintiffs-appellees River Road Alliance, Inc., et al., also filed a petition for rehearing with suggestion for rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition*, and a majority of the active judges have not voted to grant rehearing *en banc*.** The petitions for rehearing with suggestion of rehearing *en banc* are therefore DENIED.

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* Circuit Judge Harlington Wood, Jr. voted to grant the petition.

** Circuit Judges Bauer, Wood, Cudahy, Coffey and Ripple voted to grant rehearing *en banc*.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

RIVER ROAD ALLIANCE, INC., et al., *Plaintiffs,* -vs- CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al., *Defendants.* and NATIONAL MARINE SERVICE, INC., *Intervenor-Defendant.*	No. 82 5285
and PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff,* -vs- UNITED STATES ARMY CORPS OF ENGINEERS, et al., *Defendants.*	No. 83 5071

SUMMARY JUDGMENT

These two causes have been consolidated by the Court for hearing and decision on motions for summary judgment.

National Marine Service, Inc., ("National Marine") is the successor to a company which applied to the Corps of Engineers for a permit to conduct barge fleeting operations on the eastern shore of Alton Lake, at Grafton, just below the mouth of the Illinois River, pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. Sec. 403. After a public hearing the Corps granted National Marine Permit No. P-1425 on October 4, 1982. Both suits challenge that permit, claiming violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. Sec. 4321 *et seq.*, and applicable regulations.

In No. 82-5285, plaintiffs River Road Alliance, Inc. and others (the "River Road plaintiffs") brought suit against the Corps of Engineers and various officials of the Department of Defense (the "federal defendants") for declaratory and injunctive relief. National Marine intervened as a defendant. The amended complaint sought declaratory and injunctive relief against National Marine, as well. The dispute also concerns other permits which either are under consideration or have been granted by the Army Corps of Engineers for barge fleeting activities in Alton Lake. After filing what was stated to be the "administrative record," the federal defendants moved for summary judgment, and National Marine also moved for summary judgment. Plaintiffs requested that summary judgment be entered against the moving parties.

In No. 83-5071 the People of the State of Illinois brought suit against the Corps of Engineers and certain officials of the Department of Defense. The People also moved for summary judgment.

Having examined the briefs and affidavits and administrative record, and having heard the argument of counsel, and being fully advised in the premises, the Court finds that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

THE FACTS

There is a dam on the Mississippi River at Alton, Illinois, a few miles upstream from the City of St. Louis, and from the junction of the Missouri River with the Mississippi River. The dam forms a pool, or reservoir, extending for several miles upstream, beyond the junction

of the Mississippi River with the Illinois River. This pool, sometimes referred to as the Alton Pool or Pool 26, is commonly known to the people of the Greater St. Louis Metropolitan Area as Alton Lake.

On the eastern side of the Lake, close to the shoreline, are bluffs of extraordinary beauty. Between the bluffs and the lake is located the Great River Road. All parties agree with the Corps' statement that these "bluffs and river areas at and downstream of applicant's worksite provide some of the most impressive and unique vistas of any area along the Mississippi River." Vo. I, Transcript, p.224. Intervenor National Marine specifically is "in full accord in acclaiming the unique attractiveness of these areas adjacent to [National Marine's] worksite." Id. at 252.

Located with a metropolitan area with a population of more than 2½ million people, Alton Lake has become the most intensively used pool on the Mississippi River. On its perimeter are many pleasure boat marinas, private duck hunting and fishing clubs, picnic grounds, fishing sloughs, archeological sites, public access areas, and wooded river banks and wetlands occupied by wild life.

The permitted fleeting area, which extends 1500 feet along the shore covering 5 acres of water surface, is situated adjacent to a part of the Great River Road constructed by the State of Illinois during the late 1960s and early 1970s to increase public access to the natural beauty of the Mississippi River and its bluffs along the Illinois shore. The Great River Road, which in its entirety parallels the Mississippi River from its origin in Minnesota to the Gulf of Mexico, is a component of the National Scenic Highway System. 23 U.S.C. Sec. 148; Ill. Rev. Stat. 1983, Ch. 121, P.3-104.3 and 4-201.15(b). A bicycle path accompanies the Great River Road along the bluffs overlooking Alton Lake.

Through the condemnation of property and purchase of scenic easements, public funds have been expended to preserve the natural beauty of the area affected by Permit P-1425. *See* the Beautification Act of 1965, 23 U.S.C.

Sec. 319; Ill. Rev. Stat. 1967, Ch. 121, P. 4-201.15(a) (now Ill. Rev. Stat. 1983, Ch. 121 P.4-201.15(a)); *Department of Public Works and Buildings v. Keller*, 61 Ill.2d 320, 335 N.E.2d 443 (1975). The property condemned in *Department of Public Works, supra*, is immediately adjacent upstream to the National Marine fleeting site, and other property adjacent to and near the site is subject to scenic easements.

The Villages of Chautauqua and Elsah are located within one-and-a-half and four miles, respectively, of the fleeting site. Elsah was listed in the National Register of Historic Places at the time the application for Permit P-1425 was submitted. 16 U.S.C. Sec. 470(a)(1). Chautauqua was nominated for listing several months before the Corps issued an Environmental Assessment in this matter and was placed on the National Register prior to the permit's issuance.

U.S. Fish and Wildlife Service ("USFWS") and Illinois Department of Conservation ("IDOC") objected to issuance of the permit, asserting that it will adversely affect the largest mussel bed in the upper Mississippi, located at the proposed fleeting site. USFWS stated that the mussel population of the Alton Pool has drastically declined. USFWS also warned that there is an important catfish overwintering area located at the fleeting site, that overwintering areas are crucial to the maintenance of existing populations of catfish, and that the proposed fleeting will have serious consequences for the catfish.

Numerous organizations, public officials, and private citizens, including plaintiff New Piasa Chautauqua (owner of the Village of Chautauqua), expressed great concern over the adverse impacts of the proposed barge fleeting on the scenic, cultural, recreational and wildlife values of the area.

APPLICABLE STATUTE AND REGULATIONS

The Corps' power and authority to authorize activity in navigable waters pursuant to the Rivers and Harbors Act is circumscribed by the National Environmental Policy Act, 42 U.S.C. Sec. 4321 *et seq.* ("NEPA"). Section 102(2)(C) of NEPA, 42 U.S.C. Sec. 4332(2)(C), requires that for all "major federal actions significantly affecting the quality of the human environment," the responsible federal agency must prepare a detailed statement, generally known as the Environmental Impact Statement ("EIS"), on the environmental impacts of the proposed action and its long-term ramifications. In this instance the Corps declined to prepare an EIS, and instead issued its Finding of No Significant Impact.

In reviewing this determination that no significant impact will result from the operations to be permitted, the role of the Court "is to insure that the agency has taken a 'hard look' at environmental consequences . . ." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21. If the Corps fails to take the requisite "hard look," the determination of the Corps is arbitrary and capricious, in violation of NEPA.

Numerous regulations implement this statute. The Corps is required to prepare an Environmental Assessment, and any Finding of No Significant Impact is to be based on the information analyzed in the Environmental Assessment. 33 C.F.R. Sec. 230.10. In those documents and any Findings of Fact, the Corps must assess the impact of the proposed activity on all aspects of the quality of environment, 33 C.F.R. Sec. 209.410(e)(7)(i); include a brief discussion of the need for the proposed action, its environmental impacts, alternatives to the proposed action and other matters, 33 C.F.R. Sec. 230.9(c); and "present the reasons why the action will not have a significant impact on the quality of the human environment." 33 C.F.R. Sec. 230.10. In so doing, the Corps should "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement," and include brief

discussions of the need for the proposal, of alternatives, and of the environmental impacts of the proposed action and alternatives. 40 C.F.R. Sec. 1508.9.

While paying lip service to the statute, the Corps has failed to take the "hard look" required to support its conclusions, and has failed to document that "hard look" in the Environmental Assessment, Findings of Fact and Finding of No Significant Impact, in violation of 42 U.S.C. Sec. 4332(2)(C) and the applicable regulations cited above. The Corps' Finding of No Significant Impact is arbitrary and capricious in that:

1. The Corps did not take a hard look at the aesthetic impact of barge fleeting on this unique national and regional scenic resource, and did not examine whether the introduction of an industrial use is consistent with governmental actions previously taken to preserve the area's great natural beauty. The Corps also failed adequately to evaluate the aesthetic impact on the historic villages of Chautauqua and Elsah.

2. The Corps did not take a hard look at the impact of industrial barge fleeting at this site on recreational activities.

3. The Corps has excluded from consideration the cumulative impact of Permit P-1425 in relation to existing and reasonably foreseeable barge fleeting operations in Alton Lake. The Corps has disregarded the regulations of the Council on Environmental Quality, 40 C.F.R. Sec. 1508.7 and 1507.27(b)(7).

4. The Corps did not take a hard look at the potential impact of the proposed fleeting operations on the mussel bed and the overwintering catfish area located at the fleeting site, and did not give adequate weight to the views of the United States Fish & Wildlife Service and the Illinois Department of Conservation.

5. The Corps did not adequately evaluate the degree to which the effects on the quality of the human en-

vironment of the barge fleeting operation are likely to be highly controversial, notwithstanding 40 C.F.R. Sec. 1508.27(b)(4).

In addition, the Corps must comply with the other requirements of NEPA, specifically the requirement of Sec. 102(2)E, 42 U.S.C. 4332 (2)(E), that, in respect to any proposal which involves unresolved conflicts concerning alternative uses of available resources, the Corps must study, develop and describe appropriate alternatives to recommend courses of action. A detailed consideration of alternatives is also required by 33 C.F.R. 209.410(d)(1)(ii), 33 C.F.R. Sec. 230.5(e), and App. B. P. 8(a), and 40 C.F.R. 1500.2(e) and 1501.2(c). The Corps violated this statute and these regulations in failing to study, develop or describe any alternatives.

33 C.F.R. Sec. 320.4 sets out general policies the Corps must follow in reviewing permit applications under the Corps' various jurisdictional statutes, including Section 10 of the Rivers and Harbors Act. The Corps violated 33 C.F.R. Sec. 320.4(a)(1), 320.4(a)(2)(ii), 320.4(a)(2)(iii), 320.4(c), 320.4(e), and 320.4(j)(2) by failing to consider all relevant factors, the practicability of reasonable alternatives, and the long-term impact of the activities, by failing to give weight to the views of USFWS and IDOC, and by failing to consider the impact on officially recognized historic, scenic and recreational values, and local public interest factors, respectively.

Plaintiffs in both cases have requested a declaratory judgment that the permit was unlawfully granted because no Environmental Impact Statement was prepared, and the River Road plaintiffs have requested an injunction against re-issuing a permit without preparing an Environmental Impact Statement. The ruling herein makes it unnecessary to reach the issue whether an EIS must be prepared. To the extent that the complaints seek such relief, they are dismissed without prejudice. If the Corps should reopen the application proceeding in the future, and conduct a new hearing, and issue a new permit, without preparing an Environmental Impact Statement, the claim will be open for review here.

The River Road plaintiffs have requested declaratory relief respecting violations of numerous other statutes, Executive Orders, and regulations, and a permanent injunction forbidding the Corps to grant any of the pending permit applications relating to Alton Lake. It is unnecessary to reach those issues at this time. To that extent the River Road complaint is dismissed without prejudice.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court enters its Declaratory Judgment that the issuance of Permit No. P-1425 is arbitrary, capricious, an abuse of discretion, and not in accordance with law, and is therefore invalid.

2. Permit No. P-1425 is declared null and void and is hereby set aside, vacated, and held for naught.

3. Effective ten (10) days after the date of this order Intervenor-defendant National Marine Service is hereby restrained and enjoined from conducting barge fleeting activities at the permitted site unless and until a valid permit is issued.

4. National Marine is ordered to remove its mooring system and any appurtenances installed by authority of Permit No. P-1425 not later than thirty (30) days after disposition of appeal, whichever is later.

5. The proceeding is remanded to the Corps for further consideration. In the event that further proceedings are held, the federal defendants are hereby ordered to comply fully with the spirit and the letter of the statutes and regulations cited herein.

6. This order disposes of all claims asserted except the claim of the River Road plaintiffs for fees and expenses, and therefore constitutes a final judgment within the meaning of the Equal Access to Justice Act, 28 U.S.C. Sec. 2412(d)(1)(B).

7. In No. 82-5285, pursuant to 28 U.S.C. Sec. 2412(a), costs are taxed in favor of plaintiffs, one-half against the federal defendants and one-half against intervenor-defendant National Marine. In No. 83-5071, costs are taxed in favor of plaintiff against defendants. Plaintiffs' bills of costs may be submitted within thirty (30) days of entry of this order.

DATED: This 20th day of April, 1984.

/s/ William L. Beatty
United States District Judge

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	SOUTHERN DISTRICT OF ILLINOIS
RIVER ROAD ALLIANCE, INC.	Docket Number 82-5285 and 83-5071
v.	
CORPS OF ENGINEERS OF UNITED STATES ARMY and NATIONAL MARINE SERVICE	Name of Judge or Magistrate WILLIAM L. BEATTY

X *Decision by Court.* This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
That judgment is entered in favor of plaintiff and against defendants. (See order)

/s/ M. Ruth Brooks
Deputy Clerk

Date April 20, 1984

DISPOSITION FORM

Reference or Office Symbol	Subject
LMSOD-F	Environmental Assessment

To	From	Date
OD-F File (P-1425)	DE	30 October 1981 Snow/3-5703/AS-WA/1643

1. Riverway Towing Company, P. O. Box 308, Foot of Oak Street, Grafton, Illinois 62037, has applied for a Department of the Army permit to construct a barge fleeting area along the left bank of the Mississippi River near Grafton, Jersey County, Illinois, approximate mile 217.3, Upper Mississippi River. Applicant's proposal will be processed under the provisions of Section 10 of the River and Harbor Act of 1899. Applicant has applied to the Illinois Department of Transportation for a state permit. Since the proposed work does not include the placement of dredged or fill material below ordinary high water, certification in compliance with Section 401 of the Clean Water Act is not required.

2. Applicant's proposed fleeting area will extent approximately 1,500 feet in length along the left bank. Anchor fleet will consist of two 8,000-lb. bow anchors, each with 270 feet of anchor chain. Anchor chains will be supported with mooring buoys. Fleet size will be limited to 30 barges. Applicant's plans are attached.

3. Applicant's proposal has been reviewed by appropriate members of my staff. Construction, operation and maintenance of the proposed fleeting facility has been evaluated with respect to anticipated effects on natural resources and other matters of public interest.

Conservation: Natural areas in and around the Mississippi River are gradually being cleared for agricultural, commercial, industrial or residential developments. Applicant's proposal is not expected to accelerate the loss of natural areas. Establishment of barge fleets does not require construction of land-based support facilities, nor does the fleeting activity encourage the development of docks and terminals.

Aesthetics: Although an evaluation of the aesthetic value of any area is necessarily subjective, bluff and river areas at and downstream of applicant's worksite clearly provide some of the most impressive and unique vistas of any area along the Mississippi River. In the opinion of some individuals, the presence of Riverway's proposed fleeting facility, or any similar intrusion into the natural setting, would be aesthetically objectionable. Other individuals welcome the opportunity afforded by the Great River Road for a closeup view of towboats and barges. In addition to the static visual effect of moored barge fleets, a fleeting operation also presents a view of normal activities on the waterway as small push boats work to move barges in and out of fleets during the disassembly and assembly of large tows. In any event, the aesthetic impairment, or enhancement, should be minimal since Riverway's fleet will be limited to the length of six barges. If a motorist were proceeding along Great River Road at a rate of 40 miles per hour, a fleet six barges long would obstruct his view of the river for less than 25 seconds.

Water Supply: Applicant's proposed fleet, either individually or in combination with existing fleeting facilities, would not produce a significant effect on the quality of water available for industrial, municipal and other uses, nor impair operation of existing water intake facilities. The nearest water intake downstream of Riverway's proposed fleeting site is at mile 209.5 on the right bank, and at mile 204.2 on the left bank.

Water Quality: The operation of fleeting facilities in shallow areas probably involves the resuspension of bottom strata by slightly increasing stream velocities and by propeller wash created by push boats working the fleets. The resuspension of bed materials obviously increases turbidity at the fleet which extends a short distance downstream. Based on sampling and testing performed by the St. Louis District in connection with its dredge disposal operations, increases in turbidity would not extend more than 200 feet downstream of the fleet. The possibility of

water quality effects by accidental spills at fleeting facilities cannot be entirely eliminated. However, the provisions of applicant's lease prohibit the fleeting of barges carrying gasoline, petroleum products, chemicals and other hazardous materials. Applicant's proposal is not expected to produce a significant effect on water quality.

Recreation: Pool 26 is used extensively by the public for power boating, water skiing, sailboating, fishing and other water-related recreational activities. However, no marinas or launching ramps have been constructed in the vicinity of Riverway's proposed fleeting facility, and small boats generally do not operate near the site because of possible damage by rock revetment along the left bank. The principal recreational effect of applicant's proposal will be to eliminate, or impair, bank fishing for a distance of approximately 1,500 feet, and for this same distance, the moored fleet will not provide a full view of the river from the Great River Road. Overall, the effect on recreational activities is minimal.

General Environmental Concerns: The operation of a fleeting area generates relatively low levels of air pollution (diesel engine exhaust) and low to moderate levels of noise created by engines, loud speakers and the clanging of tools on steel decks. Operations at night also involve use of searchlights which are considered a nuisance by some individuals. These operational effects would produce very little impact in the area proposed by applicants since the proposed fleeting site is approximately .6 mile from the nearest residence, and developments near the site are limited to Riverway's existing fleet immediately upstream, and a rock quarry almost directly landward. The St. Louis District has received no objections from the public concerning excessive levels of pollution, noise or other environmental damage by Riverway's existing fleet.

Historic Values: The proposed fleeting facility will result in no known effect on archaeological sites nor on any historical landmark listed in the National Register of Historic Places. The nearest registered landmark is at

Elsah, Illinois, approximately 4 miles downstream. The village of Chautauqua, approximately 1½ miles downstream, has recently been nominated for registration, but its eligibility to date has not been determined. Applicant's proposal is not expected to affect the village of Chautauqua.

Endangered Species: The American bald eagle is the only endangered species that is known to inhabit the area. The Illinois Natural History Survey has informed my staff that water and shoreline areas adjacent to Riverway's proposed fleeting site do not constitute important habitat for the bald eagle. The nearest important habitat is located along the Missouri shore near Portage Island, approximately 2 miles downstream of applicant's site. A study performed for SCNO by Dr. Thomas C. Dunstan, Associate Professor of Biology at Western Illinois University, indicates that fleeting facilities have no effect on bald eagles and will not jeopardize their continued use of an area. I conclude that the bald eagle will not be significantly affected by Riverway's proposal.

Mussel Beds: During the processing of P-1425 and P-1426, the US Fish and Wildlife Service and the Illinois Department of Conservation expressed concern about possible damage to a mussel bed lying along the Illinois shore downstream of Riverway's proposed fleeting facility. In response to those concerns, Riverway elected to perform a mussel survey in the area. The survey was performed by Riverway's consultant, Midwest Aquatic Enterprises, Mahomet, Illinois, during July 1981. The survey indicates the mussel bed generally extends from miles 217.1 to 215.8. A total of 381 mussels were collected from miles 217.3 to 215.8, only 13 of which were taken above mile 217.1. No federally listed endangered mussels were collected during the survey. From the known distribution of *Lampsilis Higginsi*, its occurrence in a mussel bed near Grafton, Illinois is unlikely.

Given the number of existing impacts (commercial harvesting, passing tows, pollution), consultant does not ex-

pect additional impacts to result from establishment of Riverway's proposed fleeting facility.

St. Louis District has reviewed consultant's report and, in general, we concur in consultant's survey techniques and assessment procedures. However, we are uncertain that the mussel bed will be unaffected by bed materials resuspended by pushboats during fleeting operations. The consultant's report is currently under review by the IDOC and USFWS. Based on the recommendations of the reviewing agencies, the pending permit, if issued, will contain special conditions for the protection and/or monitoring of the mussel bed.

FINDING OF NO SIGNIFICANT IMPACT (FONSI)

I have considered and analyzed a wide range of possible impacts that could result from applicant's proposal. In attempting to fully identify all possible effects, the St. Louis District employed a variety of techniques to obtain comments and data pertinent to applicant's proposal. A large volume of information was received in response to two public notices circulated to approximately 500 individuals, agencies and groups. Additional valuable comment was obtained from area residents and others attending a public hearing at Pere Marquette State Park on 18 December 1980.

On the basis of our review of applicant's proposal, including consideration of all comments offered by interested parties, I do not expect issuance of pending Department of the Army permit P-1425, subject to proposed limitations and special conditions, will significantly affect any facet of the human environment. Accordingly, I have determined, as provided by Appendix B, ER 200-2-2, that the Environmental Impact Statement will not be filed for the pending Department of the Army permit.

/s/ Robert J. Dacey
Colonel, CE
Commanding

FINDINGS OF FACT FOR PENDING DEPARTMENT OF ARMY PERMIT (P-1425)

1. *Application for Department of the Army permit:*

a. *Description of Work Requiring Department of Army Approval:*

An application by Riverway Towing Company for a Department of the Army permit to construct, operate and maintain fleeting facilities along the left bank of the Mississippi River downstream of Grafton, Illinois, approximate mile 217.3, Upper Mississippi River, has been evaluated by the St. Louis District. The proposed fleeting area will extend 1,500 feet in length along the left bank and will consist of two 8,000 lb. bow anchors, each with 360 feet of anchor chain. Anchor chains will be supported with mooring buoys. Tie-off wires will be shackled into the anchor chains. Fleet size will be limited to 30 barges. Applicant indicates the proposed facilities will be used for temporary fleeting of barge tows which must stop at Riverway shipyards for repair or servicing of damaged barges. Approximately 8 months a year, the new facilities will also be used for general fleeting, if space is available. Construction of the new facilities is subject to approval under Section 10 of the River and Harbor Act of 1899. In accordance with regulations published at 33 CFR 320 through 325, I have reviewed and evaluated, in light of the overall public interest, applicant's proposal as well as the stated views of other interested agencies and the concerned public, relative to the proposed work in navigable waters of the United States.

b. *Sale of Riverway's Shipyard at Grafton, Illinois to National Marine Service, Inc.:*

On 30 September 1981, National Marine Service informed the St. Louis District of the purchase of Riverway Shipyard facilities at Grafton, Illinois. Riverway Towing Com-

pany confirmed the sale in a letter dated 1 October 1981. In letter dated 9 November 1981, I requested that National Marine Service review the application and all subsequent information furnished by or on behalf of Riverway at the public hearing, and in post-hearing correspondence. In letter dated 1 December 1981, National Marine Service confirmed that construction, operation and maintenance of proposed additional fleeting facilities at Grafton, Illinois would be in full compliance with all commitments and representations made by Riverway Towing Company during our processing of P-1425. Accordingly, our records have been revised to show National Marine Service is now the applicant for P-1425. Inasmuch as all public comments in the matter address "Riverway's" proposal, we will generally refer to the applicant in these Findings as "Riverway/National Marine" in order to avoid confusion. However, the terms "Riverway" and "National Marine" will also be used where appropriate.

2. *Coordination with Federal, State and Local Agencies, Environmental Groups and General Public*:

In processing applicant's proposal, all probable consequences of the proposed work were examined in order to insure that public issues would be identified and addressed. Factors bearing on my review include conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage protection, land use classification, navigation, recreation, water supply, water quality, energy needs, safety, food production, and in general, the needs and welfare of the people. In the evaluation process, applicant's proposal to establish additional fleeting facilities was subjected to normal public review procedures as follows:

a. *Pre-hearing Comments and Statements*:

Riverway/National Marine's proposal to establish fleeting facilities along the Great River Road near Grafton, Illi-

nois, was preceded by a similar proposal by SCNO Terminal, Inc. to construct fleeting facilities immediately downstream near Chautauqua, Illinois. In the two-mile stretch of river between the two towns, SCNO has requested authorization to install fleeting facilities along 8-tenths of a mile of shoreline, Riverway/National Marine proposes to install fleeting facilities along 3-tenths of a mile of shoreline, and the remaining 9-tenths mile of shore would remain open. Public notices for the SCNO proposal were circulated by the Illinois Department of Transportation and St. Louis District on 24 September and 14 October 1980, respectively. In response to our solicitation of comments for SCNO's proposal, strong objections to proposed fleeting along Great River Road, including the proposed Riverway/National Marine site, were submitted by interested parties. Responses included 10 letters expressing support for the Riverway/National Marine application, 5 letters expressing objections to both the Riverway/National Marine and SCNO proposals, and another 25 letters expressed opposition to *any* fleeting along Great River Road. Twenty-seven respondents requested a public hearing be held. In addition, we received petitions signed by approximately 1,000 petitioners who requested a hearing and offered objections to fleeting along Great River Road. A list of respondents is attached, Exhibit 1.

b. *"Notice of Public Hearing" dated 19 November 1980*:

On the basis of concerns expressed in response to our public notice for the SCNO application, P-1426, the St. Louis District and the Illinois Department of Transportation determined that a joint public hearing would be held to consider the SCNO and Riverway/National Marine applications. The hearing announcement, dated 19 November 1980, invited attendance or representation by all parties who might wish to express their views concerning either or both proposals.

c. *"Public Hearing" 18 December 1980*:

The hearing was held jointly by the State of Illinois and the Corps at Pere Marquette Lodge, Pere Marquette State Park, Illinois. Approximately 300 people were in attendance including representatives of Federal and state agencies, environmental groups and local citizens. An attendance list appears in Exhibit 3. The hearing consisted of two sessions, the first of which addressed Riverway/National Marine's proposal. Following a brief recess, SCNO's proposal was considered in the second session. During the hearing, comments were accepted on all issues which might conceivably bear on the issuance of the pending Federal and state permits. A total of 76 participants presented arguments and facts, 10 of which addressed Riverway/National Marine's proposal, 26 addressed SCNO's proposal, and 40 addressed both proposals. Parties speaking in favor of the proposals cited economics and fuel and operational efficiencies as the basis for their position. Unqualified support for the fleeting facilities proposed by Riverway/National Marine was expressed by the mayor and City Council of Grafton, Illinois; the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; and various towing and shipping interests.

Those who expressed opposition to the proposals spoke of the natural beauty of the river and bluffs along Great River Road which would be both marred and obstructed by the presence of barges moored along the shore. Objectors also contend that barge fleets along Great River Road would result in reduced tourism, environmental damage due to noise, fumes and search lights, and damage to a mussel bed.

d. *Post-Hearing Statements*:

In closing the hearing, both agencies announced that hearing participants would be allowed to submit supplemental information and statements until 15 January 1981. In response to a request submitted jointly by Senator

Charles Percy and Congressman Paul Findley, I granted a further time extension for the public comment period, which expired at close of business on 17 February 1981. A total of 174 letters were received during the post-hearing comment period. One respondent expressed opposition to Riverway/National Marine; 8 opposed SCNO; and 134 recommended further study, modification or rejection of both proposals. Nine respondents expressed support for Riverway/National Marine, 5 supported SCNO and 17 indorsed both proposals.

e. *Summary of Issues Identified by the Public, with Comments by the District Engineer*:

Our concurrent processing of two separate and distinct proposals by Riverway/National Marine (P-1425) and SCNO Barge Line (P-1426) resulted in a large volume of public comment, much of which addressed both proposals but neither in particular. An abstract of comments furnished by each individual and organization at the public hearing and in post-hearing correspondence appears in Exhibits 2 and 4, respectively. The Exhibits include comments that specifically addressed the Riverway proposal, those that address both proposals, and those that addressed fleeting in general along Great River Road. Excluded are comments received that specifically, and exclusively, addressed the SCNO proposal. Our tabulation indicates a total of 17 separate issues were identified by the public as follows:

NEED FOR ADDITIONAL FLEETING FACILITIES

Applicant explained the benefits of acquiring additional fleeting space, but some participants questioned the need for more fleeting. (Exhibit 2, page 1, comments by Alan Hauff, Slaten Bray and Mary Ann Pitchford; Exhibit 4, page 1, comments by Gary Mayes.)

District Engineer's Comment: The chronic delays for tows waiting for lockage through Lock and Dam 26 are likely to increase until the replacement structure is placed

in operation in 1987. The principal inefficiency of the small main lock at Alton is that tows with more than eight barges must perform a "double" lockage, which ties up a lock more than twice as long as a "single" lockage. Accordingly, if a tow requiring a double lockage were to tie off in a fleeting area in order to split the tow into two singles, the subsequent lockage time for both singles would be substantially less than the time required for the original double. If all upbound and downbound "doubles" were to employ "fleeting and splitting" procedures, each "double" would reduce its normal lockage time, but more importantly, the queue for all boats waiting lockage would be substantially shortened. The advantages of "fleeting and splitting" will be eliminated when the replacement Lock and Dam 26 is placed in operation since its 1,200-foot main lock will handle a 15-barge tow in a single lockage.

A full evaluation of applicant's apparent need for additional fleeting facilities *to serve the Grafton repair yard* would require a detailed understanding of the manner in which priorities are established between the towing and shipyard operations. The combined fleeting space for the towing company and the shipyard currently totals 2,500 linear feet, which compares favorably with the 3,000 linear feet of fleeting maintained by the National Marine repair facility at Hartford, Illinois. However, if the shipyard's fleeting needs are consistently assigned a low priority in relation to the growing need for general fleeting, the shipyard will continue to lose additional fleeting space, provided general fleeting increases as expected.

NAVIGATION

Navigational effects of applicant's proposal were discussed but did not become a key issue. (Exhibit 2, page 1, comments by Commander A. E. Tanos, Slaten Bray.)

District Engineer's Comment: The channel in the vicinity of the proposed fleet is more than 2,000 feet wide. I fully concur in Commander Tanos' conclusion that applicant's proposal to place a fleet no wider than six barges abreast will not create an unreasonable obstruction to navigation.

AESTHETIC VALUE OF PROPOSED FLEETING SITE

Participants, including the applicant, were in full accord in acclaiming the unique attractiveness of areas adjacent to applicant's worksite. (Exhibit 2, pages 1 and 2, comments by Alan Hauff, Glennon Tockstein, Brian Cunningham, Dr. David VanWinkle, Mark Hall, Richard Ouderkirk, Mrs. G. W. Haxel and John Browning; Exhibit 4, pages 2 and 3, comments by Richard Worthen, Richard C. Bauer, Thomas Holzberlein, Deanne Holzberlein, Merilyn Holzberlein, JoAnn Stade, Paul A. Hock, Ronald V. Wendle, G. H. Gavin, Mr. and Mrs. R. Bayless, W. Robert Rogger, Mr. and Mrs. R. J. Sauer, W. A. Christiansen, Gerald Beckerman, Mrs. Bill Evans, and Nancy A. Heinze.)

District Engineer's Comment: It is apparent that many local residents, weekend sightseers and out-of-state tourists consider that the Great River Road between Grafton and Alton provides natural vistas that are unsurpassed.

AESTHETIC IMPAIRMENT BY FLEETING

Many participants both explicitly and implicitly addressed the potential damage to the aesthetic value of the national scenic highway. (Exhibit 2, page 3, comments by Glennon Felch, Judy Felch, Brainerd Ripley, Dr. David VanWinkle and John Browning; Exhibit 4, pages 3-8, comments by Robert and Laura Rawe, Martha E. Cunningham, Mrs. Marjorie Fisher, H. G. Rollins, David Thomas, Patty Wille, Joe A. Meisel III, Mr. and Mrs. Harland Speer, Ralph J. Hood, Mrs. Joseph Voss, Gordon Grundmann, Mrs. Patricia Laffler, David A. Berkel, Charles F. Hobbs, James Green, David C. Arnold, Mrs. Wallace R. Gilbert, John Madson, David F. Stevens, John D. Spencer, Vernon B. Randall, Irene Holmer, Mr. and Mrs. Richard Herbst, Mr. and Mrs. John M. Buese, Helen Graves, C. B. Rippley, Karl J. Taglier, C. Robinson, Mr. and Mrs. John H. Stade, Mrs. Clara M. Stockenberg, Mrs. Mary Street, Barbara Minnell, Mary Hoffman, Mrs. Richard

Moser Jones, Betty Callies, Marvin Gibelman, Edward D. Selvey, Jr., Nancy A. Heinze, Linda Meisel, Helen Farnen, William Frazier, Gladys Owsley, Lance Bursac, Congressman Paul Findley-Senator Charles Percy, Bernard Fischer, David Arnold, Ralph Eisenbath, James D. O'Hane, Jr., Helen and Dudley Shaw, Gwen Norval, Barbara Ruf, Alan L. Winfield and Oletha Brunk.)

District Engineer's Comment: The fleeting of 30 barges downstream of an existing fleet will obviously be aesthetically displeasing to some individuals. The aesthetic impairment will be limited, however, since applicant's new fleet will occupy less than five percent of the more than seven miles of completely unobstructed shoreline that extends from Piasa Creek upstream to Riverway/National Marine's existing fleet. Aesthetic impairment is also diminished by placement of the fleet at the extreme upper end of the scenic bluffs that extend along the river from Alton to Grafton.

RECREATION

Some concern was expressed from the standpoint of use of Pool 26 by recreational craft. (Exhibit 2, page 3, comments by Donald Funderburk and C. D. Stine; Exhibit 4, pages 8-10, comments by Robert Schmidt, Martha E. Cunningham, Patty Wille, Mr. and Mrs. Thomas Nelson, Jr., Dorothy J. Gore, Martin A. Voss, Emmett B. Drescher, James W. Fletcher, Laurence R. McAneny, Marjory Gilbert, David A. Berkel, William Larson, William Edmunds, Richard S. Jaenson, Mr. and Mrs. John H. Stade, Charles Hobbs, D. Wisha, James M. Fabian, Clement Mulligan and Forrest Stroup.)

District Engineer's Comment: Applicant's proposed fleeting site has no unique value to recreationists since the site contains no sand beach, nor does it provide launching or mooring facilities for small boats. Applicant's proposal is not expected to significantly affect recreational use of Pool No. 26.

ECONOMIC ISSUES

A substantial number of conflicting views were expressed concerning the economic impacts of applicant's proposal. (Exhibit 2, pages 4 and 5, comments by Alan Hauff, Randall Wolter, Mary Ann Pitchford, Glennon Tockstein, James Swift, M. Painter, Robert St. Peters, Bert Seago, Robert Freeman, Gary Sorgia, Jim Delaney and Michael Northway; Exhibit 4, pages 11-14, comments by Jonathan Lehmann, Dorothy Gore, Mrs. James T. White, Homer M. Adams, Martin A. Voss, Bob Wille, Dorothy Buerkle, W. L. Cordes, Leonard Gardner, Richard C. Bauer, Woodrow W. Drescher, George Wadleigh, Robert Stafford, Clyde W. Cope, Richard J. Davidson, JoAnne Davidson, 41 petitioners through Alan F. Hauff, Mr. and Mrs. Kenneth H. Edwards, Ethel Goetz, Mr. and Mrs. David Bishop, Mr. and Mrs. Armond Bishop, Harold Apel, Paul Helgesdorf, Sam Zangori, Walter Bohn, Helen Farnen, Congressman Paul Findley-Senator Charles Percy, Gary Mayes and Alan Hauff.)

District Engineer's Comment: The local economic issues addressed by both proponents and opponents of applicant's proposal do not appear to be particularly significant. The principal economic factor is that a fleeting site on Pool No. 26, if properly operated, can result in savings of time and money for the towing industry until the replacement Lock and Dam project is operable. These savings can be expected to produce a favorable economic effect at the state and national levels.

The contention that 124 to 145 jobs could be lost if the permit is not granted must be viewed as a very remote possibility. If, in fact, insufficient fleeting space becomes critical to the survival of the shipyard, one solution would be for the shipyard to prohibit use of the existing fleeting facility for normal fleeting of transient tows and barges. The towing company could then move its fleeting operation to another location with no serious effects except that some cost benefits, such as opportunity to share tug service with the shipyard, might be lost. Ar-

guments that applicant's proposed fleet would diminish tourism dollars must also be viewed as extremely remote. Westbound motorists on the Great River Road are enroute to Grafton, or to Pere Marquette Park, or to Calhoun County; and eastbound motorists are enroute to Elsah or to Alton or to St. Louis. These motorists, by and large, will not elect alternate routes to their destinations in order to avoid the visual impact of a 1,500-foot fleeting facility. In fact, it should be expected that the Great River Road will retain its standing as one of the most popular scenic attractions in the metropolitan St. Louis area, given its natural advantages over alternative attractions available to the public.

POLLUTION, NOISE, FIRE, GENERAL ENVIRONMENTAL EFFECTS

Some participants expect substantial effects due to pollution, noise, lights and industrialization; others expect little or no effects; and still others expect improvements over existing conditions. (Exhibit 2, pages 5 and 6, comments by Alan Hauff, Randall Wolter, M. Painter, J. Bryan Collester, J. Keehner, Dr. David VanWinkle, T. Delaney, Gary Mayes and Mrs. Richard Ouderkirk; Exhibit 4, pages 14-16, comments by Southern Illinois Industrial Council, Mrs. Marjorie Fisher, Martha E. Cunningham, Mr. and Mrs. Thomas E. Nelson, Jr., Dorothy J. Gore, Mrs. Betty Hollman Clark, Bob Wille, Patte Wille, R. V. Gerber, James M. Nelson, Stephen L. Graham, Brad Westre, Helen Thatcher, David C. Arnold, Howard A. Hausafus, John F. and Janet S. Hampton, Amanda H. and John H. Rodgers, Mary O. Hungerford, Marcia McClinton, J. Bryan Collester, Byron L. Farrell, Harold L. Volkmer, Gary Mayes and Elmer Shannon.)

District Engineer's Comment: With respect to general environmental disturbances produced by fleeting operations, applicant's proposed fleet should produce no significant effects. The proposed fleeting site is approximately .6 mile from the nearest residence, and developments near the site are limited to applicant's existing fleet immediately upstream and a rock quarry almost directly landward. Noise, fumes and use of searchlights may be noticeable by motorists, hikers and cyclists traveling the Great River Road, but the level of annoyance should be no greater than that which is produced at Riverway/National Marine's existing fleet. The St. Louis District has received no complaints from the general public about Riverway's past fleeting operations. Incidents in which fires occur on fleeted barges are extremely rare.

INCREASED CONGESTION ALONG ILLINOIS SHORE

Concern was expressed that approval of the pending permit would increase congestion of tows waiting to lock through Lock and Dam 26. (Exhibit 2, page 6, comment by J. Felch.)

District Engineer's Comment: Applicant's proposal is not expected to significantly affect the congestion of tows that periodically develops along Great River Road. Increased congestion along the Illinois shore could only occur when tows awaiting lockage at Alton are backed up to or above applicant's proposed fleeting site. A backlog of such size occurs only two or three times a year for a total period of two to three weeks.

ENERGY

Proponents of the additional fleeting facility anticipate substantial fuel savings will be realized if applicant's proposal is approved. Opponents made no contentions on the issue. (Exhibit 2, page 7, comments by Randall Wolter, Darwyn Nelson and Louis Koeller; Exhibit 4, page, 16, comment by Leonard Gardner.)

District Engineer's Comment: With respect to applicant's barge repair activities, the proposed fleeting site would produce fuel savings over any other site since it is within the minimum practicable distance from the repair facilities. The secondary use of the proposed fleeting facility is for

the fleeting or barge tows to allow smaller push boats to take the barges through Lock and Dam No. 26, thus freeing the line towboat for a return trip. It is expected that some fuel savings would be achieved when the locking queue is long and the shuttle boat has a full load of barges in both directions. Minimal, or possible negative, fuel savings can be expected when the locking queue is short and when the shuttle locks through "light boat" in one direction.

GREAT RIVER ROAD/SCENIC EASEMENTS

Opponents objected to any loss of the aesthetic resource since construction of the Great River Road and the acquisition of scenic easements were paid for with public funds. (Exhibit 2, pages 7-8, comments by Mary Ann Pitchford, Robert St. Peters, Judy Felch, Brian Cunningham and Robert Edmonds; Exhibit 4, comments by Emmett B. Drescher, Bob Wille, Ralph J. Hood, G. W. Haxel, Senator John C. Danforth, James C. Roberts, Mrs. Patricia Laffler, Philip Child, Homer M. Adams, Martin A. Voss, Dorothy J. Gore, James M. Nelson, Mr. and Mrs. Thomas E. Nelson, Jr., William R. Thomas, Jr., Mr. and Mrs. Harland Speer, Joseph Voss, Mrs. Betty Hollman Clark, H. G. Rollins, Margaret Middlecoff, Robert and Ann Fischer, Robert P. and Imogene Chevalley, Robert C. Manion, Mr. and Mrs. R. C. Pearce, Charles N. Grandy, Dr. Robert L. Allen, Dale L. Klohr, Kevin F. Blaine, Joseph A. and Patricia L. Miller, Dr. Harry Kircher, Mrs. W. Clark Doak, Margaret W. Flint and Mr. and Mrs. A. Lyndon Bell.)

District Engineer's Comment: The "National Scenic Highway" extends along the left bank of the Mississippi River from Alton, Illinois upstream to Grafton, Illinois. The upper nine miles of the scenic highway, which includes the section adjacent to Riverway/National Marine's proposed fleeting facilities, provides a continuously unobstructed view of the river from Piasa Creek upstream to its upper terminal at Grafton. Any significant impairment of the aesthetic value of areas along the highway would obviously diminish the benefits of Federal and state funds expended to make the scenic area available to the public by construction of the Great River Road.

However, Riverway/National Marine's proposal would not constitute a violation of the scenic easements acquired by the State of Illinois. The easements apply only to specified areas lying landward of the landward edge of the Great River Road.

ENDANGERED SPECIES

Several participants addressed the issue of possible adverse effects on the American Bald Eagle. (Exhibit 2, pages 8-9, comments by Mrs. Mary Bresler, Donna Hart, Ralph Shook and Max Griffith; Exhibit 4, pages 20-22, comments by Mr. and Mrs. Thomas E. Nelson, Jr., Dorothy J. Gore, Mrs. James T. White, Robert and Laura Rawe, Martha E. Cunningham, Bill Evans, George German, Elmer Shannon, Gary Mayes, Marvin Gibelman, Pete Dignan, and Mr. and Mrs. John Prokovich.)

District Engineer's Comment: The American bald eagle is the only endangered species that is known to inhabit areas adjacent to the worksite. In December 1980, Dr. Thomas C. Dunstan, Associate Professor of Biology at Western Illinois, was retained by SCNO Terminal Corp. to comment on possible effects on wintering bald eagles that could be expected from operation of a fleeting facility along the Great River Road. The area of interest to SCNO lies immediately downstream of the proposed Riverway/National Marine fleeting site. On 15 December 1980, Dr. Dunstan visited SCNO's proposed fleeting site and observed eight eagles perched along the adjacent cliffs and vegetated slopes. None of the perched eagles were flushed when four different towboats moved upstream past the site. Based on his on-site observations, supplemented by other data he has compiled during 13 years of research on wintering eagles, Dr. Dunstan concludes that the operation of fleeting facilities along Great River

Road will have no effect on bald eagles and will not jeopardize their continued use of the area. Dr. Dunstan's conclusions are consistent with the findings of my technical staff.

MUSSEL BEDS

Concern was expressed that applicant's proposal would create potential damage to an existing mussel bed. (Exhibit 2, page 9, comment by Robert Schanzle; Exhibit 4, pages 22-24, comments by Patty Wille, Mr. and Mrs. Thomas E. Nelson, Brian C. Cunningham, Mrs. Marjorie Fisher, Martha E. Cunningham, Richard Worthen, Alfred Talbert, Donna Hart, Donald J. Sprinot, M. Celeste Little, Tom Saunders, Congressman Paul Findley-Senator Charles Percy, David Kenney and Gary Mayes.)

District Engineer's Comment: In response to concerns expressed at the hearing and in subsequent correspondence, applicant elected to perform a mussel survey in the area of its proposed fleeting facility. The survey was performed by a consultant, Midwest Aquatic Enterprises, Mahomet, Illinois, during July 1981. The survey indicates the mussel bed generally extends from miles 217.1 to 215.8. A total of 381 mussels were collected from mile 216.3 to 215.8, but only 13 of which were taken above mile 217.1. The consultant reports that commercial clammers do not work above mile 217.1 because population densities are so low. No federally listed endangered mussels were collected during the survey. From the known distribution of *Lampsilis higginsi*, its occurrence in a mussel bed near Grafton, Illinois is unlikely.

The consultant's findings are summarized as follows:

o The mussel bed is currently subject to periodic siltation as evidenced by the small population of mussel species intolerant of silt.

o Nearly all (99.5%) of the mussel population would be likely to tolerate some increases in siltation. One species might be eliminated.

o Moderate siltation could eliminate another six species, reducing the population to about one-half its present level.

o Heavy siltation could eliminate virtually all of the mussel species.

o Consultant does not expect, on the basis of existing flow patterns, that any bed materials resuspended in fleeting area would be deposited on the mussel bed.

o Given the number of existing impacts (commercial harvesting, passing tows, pollution) consultant does not expect additional impacts to result from establishment of applicant's proposed fleeting facility.

St. Louis District has reviewed consultant's report and, in general, we concur in consultant's survey techniques and assessment procedures. However, we do not share consultant's expectation that bed materials resuspended in the fleeting area will somehow be conveyed across the river for deposit along the Missouri shore. Under low flow or "flat pool" conditions, a slow but consistent migration of bed materials almost *directly downstream* is more likely. If the permit is granted, it will require that permittee repeat the mussel survey after the facility has been in operation for two years.

SEEK ALTERNATE SITE

Applicant described efforts to find alternative sites. Other participants urged that an alternative site should be found and approved. (Exhibit 2, page 9, comments by Alan Hauff, Darwyn Nelson, Robert Chase, Donald Spencer, Mrs. Richard Ouderkirk and George Wadleigh; Exhibit 4, pages 24, 28, comments by Edward R. Levitz, Laurence R. McAneny, Brian C. Cunningham, Robert L. Schmidt, Joseph Voss, Mrs. Joseph Voss, Jonathan Lehmann, Mrs. G. W. Haxel, Dorothy R. Buerkle, Gordon Grundmann, Martha E. Cunningham, Mrs. Bill Evans, Mrs. Betty Hollman Clark, Charles Hobbs, R. V. Gerber, Wilbur J. Larson, Marjory N. Gilbert, James D. Robertson, Harry and Verna Rogers, Maxine C. Allen, Mary Ann Pitchford,

Mrs. F. Edward Ince, Mrs. James Howard, John D. Kerr, Robert L. Middlecoff, Carl F. Bensiek, Ralph M. Shook, Mary Ann Pitchford, Blanche C. Darnell, N. D. Timmermeier, Jim Reilly, Vince Demuzio, Gary Mayes, Mr. and Mrs. Andrew Bylinowski, and Mrs. F. R. Yeager.)

District Engineer's Comment: In my judgment, efforts by Riverway and SCNO to find alternative fleeting sites prior to submitting their permit applications were not sufficiently broad or thorough. SCNO subsequently submitted an application for a fleeting facility at the Portage Des Sioux power plant. Interested parties expressed no opposition to the Portage Des Sioux site, and I issued a permit for SCNO's proposed fleet on 2 December 1981.

Similarly, we believe several prospective fleeting sites could be found as alternatives to Riverway/National Marine's proposed site at Grafton. However, siteing considerations for Riverway/National Marine are more stringent than for SCNO since the primary objective of Riverway/National Marine's proposal is to provide additional fleeting for the repair facility. The Grafton site offers advantages over any alternative sites in terms of operational efficiencies and reduced fuel consumption, but we do not concur in applicant's conclusion that alternative sites do not exist.

NEED FOR ENVIRONMENTAL IMPACT STATEMENT

Several participants expressed their view that an EIS should be prepared for the pending Federal action. (Exhibit 2, page 10, comments by Brian Cunningham, J. Keehner, Robert Freeman and Ralph Shook; Exhibit 4, pages 28-30, comments by Charles Hobbs, Brian C. Cunningham, Richard L. Purdy, William R. Thomas, Jr., Martin A. Voss, James and Harold Roberts, Martha E. Cunningham, H. R. Rollins, Margaret Middlecoff, Mr. and Mrs. Thomas E. Nelson, Jr., Bob Wille, Robert and Ann Fischer, Joe A. Meisel III, Edward R. Levitz, Mrs. Patricia Laffler, Robert C. Manion, Stephen L. Graham,

May Edmunds, William and Pat Aksamit and David Kenney.)

District Engineer's Comment: My conclusion that preparation of an Environmental Impact Statement for Riverway/National Marine's proposal is not warranted is addressed in paragraph 5 of this memorandum, and in an environmental assessment dated 30 October 1981.

PREPARE MASTER PLAN FOR POOL 26

Several post-hearing respondents recommended a master plan for Pool 26 be developed before any permanent fleeting permits are issued. They suggested the plan be developed with participation by environmentalists, recreational groups, communities like Chautauqua and Elsah, barge lines and governmental representatives. Two individuals suggested no permits be issued until the UMRBC master plan is available. (Exhibit 4, pages 30-32, comments by Mrs. Patricia Laffler, Robert P. and Imogene Chevally, Betty Lee Thomas, Elsie and A. Lyndon Bell, Martin A. Voss, H. G. Rollins, Margaret Middlecoff, Bob Wille, Robert and Ann Fischer, Joe A. Meisel III, Martha E. Cunningham, James and Harold Roberts, Philip S. Child, Lucille B. Schmidt, Pat and Bill Aksamit, Senator Charles Percy-Congressman Paul Findley, Elizabeth S. Hood, Brian C. Cunningham, Ralph J. Hood and Charles Hobbs.)

District Engineer's Comment: The Corps currently has no authority to develop or implement multi-use plans for private lands abutting Pool 26. Our authority to regulate use of such lands is limited to those activities that are subject to approval under Department of the Army permit programs. Department of the Army permits are required for proposed construction and work performed below ordinary high water, and for placement of dredged and fill materials into wetlands adjacent to the waterway. Lands in private ownership adjacent to Pool 26 have a total shoreline length of 204 miles, approximately four times greater than the length of government-owned shoreline. I am uncertain that the development of a comprehen-

sive multi-use plan for all lands adjacent to Pool 26 would contribute to the public interest. Since matters of national and interstate significance can be effectively regulated through our regulatory programs, any additional controls that may be needed, in my judgment, should be imposed by state, county, municipal, or other local entities. The St. Louis District would be available to assist such local entities in the development of multi-use plans for private lands along Pool 26, *provided* appropriate representatives of the areas to be zoned specifically request our participation. I received several suggestions that we postpone action on applicant's proposal until a master plan to be prepared by the Upper Mississippi River Basin Commission, under the provisions of P.L. 95-502, has been approved by Congress. I am unable to concur in those suggestions although the final UMRBC master plan is complete, it should be noted that Section 101(b) Public Law 95-502 provides that the *final master plan shall not be implemented without the express approval of the plan by an act of Congress.* Any effort on my part to apply the UMRBC master plan, especially in view of the explicit prohibition against implementation of such a plan prior to congressional review and approval, would be totally inconsistent with my responsibility to administer a fair and reasonable regulatory program.

FISH AND WILDLIFE RESOURCES

Divergent views were expressed by members of the public concerning the effects of fleeting on fish and wildlife resources. (Exhibit 4, page 32, comments by James W. Fletcher, W. L. Cordes, George German, Emmett B. Drescher and Mrs. Deborah A. Palfreeman.)

District Engineer's Comment: If applicant's proposal is approved and implemented, approximately five acres of water surface will be covered by a moored fleet of 30 barges. Along with this loss of exposed surface area, there will be a concomitant loss of light available for phytoplankton production. Such an impact may not be significant since the Mississippi River, with its normally high turbidity, probably relies more on organic debris rather than phytoplankton production as its food base. The moored fleet along with the propeller wash produced by pushboats working the fleet may tend to create disturbances of the river bottom resembling those conditions prevailing in the navigation channel. The agitation of bottom substrates during fleeting operations could result in the resuspension of sediments. Although tow traffic studies have indicated that the magnitude of resuspension can be related to tow size, speed, draft, direction of travel, engine horsepower, depth of water, and type of traffic, there is presently no quantitative data linking these factors to changes in the biota. Although applicant's proposed fleeting site affords greater water depths than prevails at most fleeting facilities (15′ to 25′ at low water, 1976 survey), some resuspension of sediment is expected to develop and result in some reduction in production of aquatic biota, but not significant reductions. Applicant will be required to periodically monitor the condition of an existing mussel bed. The extent to which the proposed fleeting facility would affect eagles, canvas back ducks, otters and other forms of wildlife has not been conclusively established. However, neither the US Fish and Wildlife Service, the Illinois Department of Conservation, nor the Missouri Department of Conservation has expressed opposition to barge fleets on the basis of potential or demonstrated effects on wildlife. A brief study performed for SCNO by Dr. Thomas Dunstan in 1980 indicates barge fleets should have no effect on bald eagles and should not jeopardize their continued use of an area. Members of my technical staff find no reason to conclude that barge fleets represent a hazard to wildlife, nor do they expect eagles and waterfowl will abandon areas adjacent to applicant's worksite due to establishment of additional fleeting facilities.

HISTORIC VALUES

Several respondents expressed confidence that the historical significance of Chautauqua would warrant its listing

in the National Register of Historic Places. (Exhibit 4, page 33, comments by Dorothy R. Buerkle, B. J. Middelton, Illinois Department of Conservation, Heritage Conservation and Recreation Service, and Law Committee of Riverroad Alliance.)

District Engineer's Comment: The proposed fleeting facility will result in no known effect on archaeological sites nor on any historical landmark listed in the National Register of Historic Places. The nearest registered landmark is at Elsah, Illinois, approximately 4 miles downstream. The village of Chautauqua, approximately 1½ miles downstream, has recently been nominated for registration, but its eligibility to date has not been determined. Applicant's proposal is not expected to affect the village of Chautauqua.

3. *Review by St. Louis District Staff*:

Applicant's proposal has been reviewed by elements of the St. Louis District staff in order to identify potential impacts on facets of the total public interest.

a. *Safety*:

(1) *Anchors and Chains*:

Anchoring systems should generally satisfy criteria recommended by the Waterways Experiment Station in a study undertaken for the St. Louis District in 1975. The WES study involved a fleet proposed in St. Louis Harbor where current flows are much stronger than in Pool 26. Application of the WES recommendations would require that Riverway/National Marine install the equivalent of three 10,000-pound Danforth anchors. St. Louis District requested that Riverway/National Marine provide an engineering assessment of its proposed anchoring system, which consists of two 8,000-pound stockless anchors with 360 feet of 2-3/8-inch chain. On 10 April 1981, applicant submitted an analysis of its proposed anchoring system which was prepared by Design Associates, Inc., New

Orleans, Louisiana. The consultant's analysis indicates the fleet will experience a maximum horizontal force of 63 kips under extreme flow conditions, approximately 30 kips below the holding capacity of the anchoring system. My staff concludes that a 30-kip margin of safety should be adequate. Maximum fleet size and maximum fleet width will be specified on the approved permit drawings. In addition, special permit conditions will be incorporated into the draft and final permit, as described in paragraph 3a.(3) of these findings.

(2) *Depth of Anchors*:

The Waterways Experiment Station study recommended that anchors be placed sufficiently deep such that anchor flukes will not become exposed by erosion of river bed. In order to satisfy that criterion, anchors should be set at a depth of 20 feet below the flat pool elevation of 419 feet NGVD.

(3) *Special Conditions to Assure Safe Fleeting Operations*:

It is uncertain that applicant's proposed anchoring systems will be adequate under all conditions that can reasonably be expected to occur in the waterway. The following special conditions will be imposed if the Riverway/National Marine proposal is authorized and constructed:

o That permittee shall insure moored fleet is continuously maintained at or below the maximum size specified on the attached plans. Consistent with prevailing stage and channel conditions, fleet shall be reduced, including complete removal of all barges, if required, to provide free and easy passage for river traffic.

o That permittee, to the extent possible, shall prevent or remove accumulation of ice and drift.

o That permittee shall reduce fleet size, or take other actions that may be necessary to prevent failure of the anchoring system under any load conditions that may be imposed by flood, ice flows, storms or otherwise.

o That in the event permittee's anchoring system fails to hold the moored fleet in position, permittee shall promptly return the anchors and anchor barge to the position authorized by this permit. Permittee shall report such incidents to the District Engineer within 24 hours, and such reports shall include an account of measures taken or proposed by permittee to prevent future incidents.

o That permittee is authorized to install additional anchors, chain, or both, to proposed anchor barge, provided such additions do not adversely affect navigation. Plans for the work shall be submitted to the District Engineer for concurrence within 5 days following such installation.

o That permittee shall limit the mooring of empty barges or take other actions that may be necessary to prevent channelward rotation of fleet under any and all conditions.

b. *Dredging and Dredged Material Disposal Operations*:

Wherever possible, dredging and disposal operations will be performed such that barge fleeting operations are not disturbed. However, the draft permit for applicant's proposed fleet near Grafton will contain a special condition as follows:

o That permittee shall temporarily remove the anchor barge and fleet, or temporarily reduce fleet, as may be necessary to minimize interference with channel maintenance dredging and disposal operations undertaken by the Corps of Engineers.

c. *Imposition of Special Conditions*:

o That permittee shall not moor barges containing materials classified as hazardous by the US Coast Guard. There materials include but are not limited to gasoline, petroleum products, chemicals and similar products.

o That permittee shall not engage in major repair or maintenance operations, loading, unloading or transferring cargo except when required to prevent a barge from sinking.

o That permittee shall not permanently moor any work barges, anchor barges or fleet barges, derelicts or sunken vessels at the site.

o That permittee shall minimize flashing of search lights on the shore and shall avoid excessive noise from bullhorns and machinery.

d. *Duration of Permit*:

The current need for Riverway/National Marine to perform "general fleeting" as opposed to fleeting required in connection with the Grafton repair facility, should diminish substantially when the replacement Lock and Dam No. 26 is placed in operation. With the reduction in general fleeting, the 2,500 linear feet of fleeting space currently maintained by Riverway/National Marine should be adequate for both "general" and "repair" fleeting requirements. The draft permit will include a special condition as follows:

o That permittee shall discontinue mooring of barges at facilities authorized by this permit following notification by the District Engineer that removal of the existing Lock and Dam No. 26 structures has progressed such that a safe and adequate bypass channel is available for barge traffic. Permittee shall vacate the site within 90 days of such notice and shall restore the area to the satisfaction of the District Engineer.

4. *Other Considerations*:

a. *Illinois Department of Transportation Permit*:

Riverway had applied to the Illinois Department of Transportation for a State of Illinois permit in accordance with the provisions of the Illinois Rivers, Lakes and Streams Act. However, on 16 September 1981, new legislation was enacted by the State of Illinois, amending the Act as follows:

> "Notwithstanding any provision of this Act to the contrary, the Department of Transportation shall have no power to promulgate rules or regulations, or to issue or deny permits, with respect to barge fleeting areas in rivers located wholly or partly within this State. For purposes of this paragraph, 'barge fleeting area' means a facility, at a fixed site, which is used to provide barge mooring services."

By letter dated 5 October 1981, Mr. Dave Boyce, Illinois Department of Transportation, informed Riverway that his agency no longer had authority to issue or deny permits for fleeting facilities and had discontinued processing such applications.

b. *Section 401 Certification*:

The installation, operation and maintenance of fleeting facilities addressed in this memorandum will not involve a discharge of dredged or fill material into waters of the United States. Accordingly, Section 401 certification by the Illinois Environmental Protection Agency will not be required.

5. *Finding of No Significant Impact (FONSI)*:

My finding that issuance of the pending Department of the Army permit would produce no significant impact on the human environment is recorded in an environmental assessment which I signed and placed in the public record on 30 October 1981.

6. *Determination and Findings*

The possible consequences of issuing the pending Department of the Army permit have been studied on the basis of economics, engineering feasibility, and anticipated effects on the total environment. I have considered and analyzed a wide range of possible impacts that could result from the construction and operation of the proposed fleeting facility. In attempting to fully identify all possible ef-

fects, the St. Louis District employed a variety of techniques to obtain comments and data pertinent to applicant's proposals. In addition to a large volume of data submitted by the applicant, considerable relevant information was received in response to two public notices. Additional valuable comment was obtained from interested parties during a public hearing held at Pere Marquette State Park on 18 December 1980. Input to the study was also provided by Federal, state and local agencies and environmental groups. I find that issuance of a Department of the Army permit, as prescribed by regulations published at 33 CFR 320 through 325 to establish a barge fleeting facility along the Illinois shore of the Mississippi River at Grafton in Jersey County, is based on thorough analysis and evaluation of the various factors addressed in this memorandum; that the proposed work is indorsed by the municipality and county in which the work will be implemented; that the proposed work is deemed to comply with established state and local laws and regulations, that there have been no identified significant adverse environmental effects related to the work; that the issuance of this permit is consonant with national policy, statutes, and administrative directives; and that, on balance, the total public interest should best be served by the issuance of a Department of the Army permit for the proposed work.

15 June 82
DATE

/s/ Robert J. Dacey
Colonel, CE
Commanding

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

Honorable G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks
Department of Interior
Washington, D.C. 20240

Dear Mr. Arnett:

This responds to your letter of August 25, 1982 requesting review under our Memoranda of Agreement (MOA) of the decision of the St. Louis district engineer to issue a permit to National Marine Service, Inc. to construct a barge fleeting facility in the Mississippi River near Grafton, Illinois.

With the three criteria for elevation firmly in mind, I have reviewed your letter and the correspondence to the Corps from your regional director as well as the environmental assessment and the Finding of Fact by the district engineer. Let me point out that the Corps proposes to withdraw this permit and require appropriate restoration when the new Lock and Dam 26 is completed in 1987 since there will no longer be any need for the fleeting area. You have raised five issues in your letter and I shall address them in turn although I find it difficult to see that any are issues of national concern requiring policy level review.

The first issue concerns a possible impact of the fleeting area on the downstream mussel bed which you state is the largest in the three hundred mile reach of the Upper Mississippi River. When this concern was expressed in the processing of the application, a study was performed which concluded that re-suspended bed material would not be deposited on the mussel bed and that there should be no impacts to the mussel beds from the proposed fleeting activity. The Corps will require the applicant to repeat the mussel study after two years to determine if impacts are occurring. This will allow the opportunity for corrective action in the event it is appropriate.

The second point concerns the possible impact on catfish over-wintering in the fleeting area. Your letter states that "abundance and distribution of wintering catfish areas are poorly documented". Since neither the environmental assessment, the Finding of Fact, nor the record of the public hearing indicates any concern over the catfish and the subject was apparently not raised until the elevation process, I must presume that the impacts are somewhat speculative and are not an issue of major concern. Also, the fleeting area only covers a small portion of Lake Alton and would only be a temporary fixture.

The third point concerns the possible impact on recreational users. The loss of fishing surface area is of a de minimus nature and the adjacent shoreline contains no launching ramps or beaches. I support the district engineer's finding that there is no significant impact on recreational uses.

As a fourth point, you indicated that there was not a sufficient consideration of alternative sites. The district engineer agrees that alternate sites could be found for the proposed project but he believes that the proposed "site offers advantages over any alternate sites in terms of operational efficiencies and reduced fuel consumption". The hearing record indicates that there had been a previous unsuccessful attempt to obtain river frontage for fleeting operations. I find that the subject of alternative sites has been adequately addressed and in light of the inconclusive nature of the impacts which might possibly be caused by use of the proposed site there is no need for further search for alternative sites.

Finally, your letter points out that there is no area-wide plan for large fleeting operations. While the Corps has no authority to develop or implement multi-use plans for private land abutting Pool 26, the district engineer states his willingness to assist any local governments in the preparation of such a plan.

I must conclude from the information which I have reviewed that this case contains no issues of national concern which need policy level review nor are there indications of inadequate coordination or new information. Therefore, I have decided not to have the district engineer's decision reviewed at a higher level. I encourage you to request review of only those cases which clearly meet the criteria of the MOA.

Sincerely,

/s/ William R. Gianelli
Assistant Secretary of the Army
(Civil Works)

cf: SACW (read,file,sign)
SASG
LTC/Peizotto/daw/15 Sep 82

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 4332
(National Environmental Policy Act)

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

* * *

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

33 C.F.R. Part 230, Appendix B
(Regulations of the Corps of Engineers)

8. *EA/FONSI Document.* (See 40 CFR 1508.9 and 1508.13 for definitions).

a. *Environmental Assessment (EA).* The district engineer shall prepare an EA as soon as practicable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to preparation of the Findings of Fact (FOF). The EA shall include a discussion of reasonable alternatives. However, when the EA confirms that the

impact of the applicant's proposal is not significant, there are no "unresolved conflicts concerning alternative uses of available resource . . ." (Section 102(2)(E) of NEPA), and the proposed action is a water dependent activity, the EA need not include a discussion on alternatives to the proposal. In all other cases the EA must address all the alternatives, that go before the ultimate decision maker. This discussion will include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning of the permit. The EA shall be a brief document (should not normally exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment but shall not be used to justify a decision. (For example, where a utility company is applying for a permit to construct an outfall pipe from a proposed power plant, the EA must assess the direct and indirect environmental effects and alternatives of the entire plant.) The EA shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required.

b. *Responsibilities in Preparing EA.* If information for an EA is undertaken by an outside consultant or prepared by the applicant, the district engineer is responsible for independent verification and use of the data, evaluation of the environmental issues, and for the scope and content of the EA. Preparation of an EA shall be based on considerations discussed in 40 CFR Parts 1501, 1506 and 1508 and the instruction contained in paragraph 9 of the basic regulation.

40 C.F.R. § 1506.5
(Regulations of Council on Environmental Quality)

1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the

agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.